

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 21037463
A. ESHAGHIAN,)	CDTFA Case IDs 984104, 985459
dba Vintage Wearhouse Old School)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Raman Zoobalan, Representative
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For Respondent:	Jason Parker, Chief Headquarters Operations Bureau
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For Office of Tax Appeals:	Deborah Cumins, Business Taxes Specialist III
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N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, A. Eshaghian dba Vintage Wearhouse Old School (appellant) appeals a decision issued by the California Department of Tax and Fee Administration (respondent)¹ denying appellant’s petition for redetermination of a Notice of Determination (NOD) dated October 24, 2016. The NOD is for tax of \$86,075.13, plus applicable interest and a negligence penalty of \$8,607.54,² for the period July 1, 2013, through May 31, 2016 (audit period).³ In a notice dated October 10, 2019, respondent increased the tax from \$86,075.13 to \$209,334.00,

¹ Sales and use taxes were formerly administered by the State Board of Equalization (board). In 2017, functions of the board relevant to this case were transferred to Respondent. (Gov. Code, § 15570.22.) For ease of reference, when this Opinion refers to events that occurred before July 1, 2017, “Respondent” shall refer to the board.

² In the NOD, the entire penalty, \$8,607.54, was identified as a negligence penalty. In the reaudit dated October 7, 2019, respondent indicated that for the period January 1, 2016, through May 31, 2016, the 10 percent negligence penalty should be replaced with a 10 percent failure-to-file penalty.

³ As of October 7, 2019, the date of respondent’s Notice of Reaudit Results, appellant had paid \$45,000. Appellant has filed a protective claim for refund for any amounts that might have been overpaid due to reporting errors or misunderstanding of the law. Although respondent’s January 26, 2021 Decision states that the claim for refund is denied, the claim for refund is unripe until the liability is paid in full (*Calif. Dept. of Tax and Fee Administration v. Superior Ct.* (2020) 48 Cal.App.5th 922), and, the Office of Tax Appeals (OTA) lacks jurisdiction over it. Accordingly, the claim for refund will not be addressed herein.

and the penalties from \$8,607.54 to \$20,933.39 (\$14,883.98 negligence penalty and \$6,049.41 failure-to-file penalty).⁴

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

FACTUAL FINDINGS

1. Appellant operated a retail store selling vintage-style clothing from January 1, 2012, through May 31, 2016. The business was then closed, with no successor.
2. During the period July 1, 2013, through December 31, 2015, appellant reported total sales of \$301,218, claimed deductions of \$121,276 for nontaxable sales for resale and \$1,579 for sales tax included (for the first quarter 2014 (1Q14) only), and reported taxable sales of \$178,363. Appellant did not file sales and use tax returns for 1Q16 or 2Q16.
3. Appellant provided no books or records for audit, despite multiple requests.
4. Using data from Forms 1099-K⁵ obtained from the California Franchise Tax Board, respondent compiled appellant's gross receipts from credit card payments of \$469,071 for the period July 2013 through December 2014.
5. Respondent did not have Forms 1099-K data for the period January 1, 2015 through May 31, 2016, so respondent used the average quarterly amount of credit card receipts from July 2013 through December 2014 as an estimate for the period January 1, 2015 through May 31, 2016. In total, respondent computed total credit card receipts, net of tax, of \$836,773. Due to the lack of records, respondent used an estimated credit card to total sales ratio of 70 percent to compute audited total sales of \$1,195,389.⁶ Respondent

⁴ Appellant has not requested relief of the penalty for failure to file returns for the period January 1, 2016, through May 31, 2016. Respondent's Decision states that in an October 12, 2020 letter, respondent explained to appellant that he could file a request for relief of the failure-to-file penalty, but appellant did not do so. In addition, in a letter dated May 26, 2022, OTA requested that appellant provide any documentation that appellant wanted considered as part of this appeal; however, appellant did not respond to this letter. Furthermore, appellant has not specifically protested the negligence penalty in its appeal to OTA. Thus, it will not be addressed here.

⁵ Form 1099-K is an Internal Revenue Service form titled, "Payment Card and Third Party Network Transactions", which shows the monthly and annual amounts paid to a merchant by a bank, credit card company, or third party network during a given time period. Form 1099-K includes payments made by any electronic means, including but not limited to credit cards, debit cards, and PayPal.

⁶ $\$836,773 \div 0.7 = \$1,195,390$. The minor difference of \$1 is the result of rounding.

- deducted the claimed deductions for nontaxable sales for resale of \$121,276 to compute audited taxable sales⁷ of \$1,074,113.
6. Respondent compared audited taxable sales of \$1,074,113 to reported taxable sales of \$178,363 to compute an understatement of \$895,750.
 7. Respondent disallowed 50 percent of appellant's claimed nontaxable sales for resale, \$60,639 ($\$121,276 \times 0.5 = \$60,638$).⁸
 8. On October 24, 2016, respondent issued the NOD for tax of \$86,075.13 and negligence penalty of \$8,607.54.⁹
 9. On October 27, 2016, appellant filed a petition for redetermination.
 10. Respondent subsequently obtained Form 1099-K data for the period January 1, 2015, through May 31, 2016 and conducted a reaudit, using this information, which reflected credit card receipts for that period of \$1,487,965.
 11. Respondent thus established audited credit card receipts of \$1,957,036 ($\$469,071 + \$1,487,965$) for the audit period. It reduced that figure by the amount of sales tax included to compute audited credit card receipts, net of sales tax, of \$1,795,446. Respondent divided that figure by 0.7 to compute audited total sales of \$2,564,921.¹⁰ Respondent deducted claimed nontaxable sales for resale of \$121,276 to compute audited taxable sales of \$2,443,645.
 12. Respondent then computed an understatement of reported taxable sales of \$2,265,282 ($\$2,443,645 - \$178,363$ reported).
 13. Thus, the audited understatement of reported taxable measure increased by \$1,369,532 in the reaudit, from \$956,389¹¹ to \$2,325,921.¹²

⁷ Respondent labeled the difference between audited total sales and claimed nontaxable sales for resale as "audited taxable sales." The term "audited taxable sales" is a misnomer since the disallowed claimed sales for resale are also taxable sales. However, for consistency, OTA will use the term respondent used.

⁸ The minor difference of \$1 is the result of rounding.

⁹ As noted in an earlier footnote, the NOD identified the entire penalty, \$8,607.54, as a negligence penalty, but the October 7, 2019 reaudit indicated that it should have been identified as a negligence penalty of \$7,070.62 and a failure-to-file penalty of \$1,536.92, for the period January 1, 2016, through May 31, 2016.

¹⁰ $\$1,795,446 \div 0.7 = \$2,564,923$. The minor difference of \$2 is due to rounding.

¹¹ $\$895,750$ understatement of taxable sales + $\$60,639$ disallowed claimed sales for resale = $\$956,389$.

¹² $\$2,265,282$ understatement of taxable sales + $\$60,639$ disallowed claimed sales for resale = $\$2,325,921$.

14. On October 10, 2019, respondent notified appellant of the increase in the determined amount, resulting in an increase in tax of \$123,258.87 (from \$86,075.13 to \$209,334.00), and increase in penalties of \$12,325.85 (from \$8,607.54 to \$20,933.39).¹³
15. According to respondent, appellant stated during respondent's appeals conference on October 6, 2020, that he had provided three boxes of documents to respondent on September 3, 2020.
16. Respondent's audit staff stated that it conducted a cursory review of the documents in the boxes and noted that appellant had not included a list of the documents or any explanation of what appellant intended the documents to show.
17. On January 26, 2021, respondent issued a Decision in which it denied the petition for redetermination and ordered that the liability be redetermined in accordance with the reaudit.
18. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown that adjustment is warranted to the audited amount of disallowed claimed nontaxable sales for resale.

California imposes sales tax on a retailer's retail sales of tangible personal property sold in this state measured by the retailer's gross receipts, unless the sale is specifically exempt or excluded from taxation by statute. (R&TC, §§ 6012, 6051.) For the purpose of the proper administration of the Sales and Use Tax Law and to prevent the evasion of the sales tax, the law presumes that all gross receipts are subject to tax until the contrary is established. (R&TC, § 6091.)

A retailer's gross receipts are presumed subject to tax, and the burden of proving that a sale of tangible personal property is not at retail is upon the retailer unless the retailer takes in good faith a resale certificate from the customer stating that the property is purchased for resale. (R&TC, §§ 6091, 6092; Cal. Code Regs., tit. 18, § 1668(a).) If a seller fails to timely obtain a resale certificate in proper form, the seller will be relieved of liability for the tax only where it shows that the property at issue: (1) was in fact resold by the customer and was not used by the

¹³ The Notice of Increase in the liability was timely issued because the liability was not yet final, and the notice was issued within three years from the date the NOD was issued. (R&TC, § 6563(a)(1).)

customer for any purpose other than retention, demonstration, or display while holding it for sale in the regular course of business; (2) is being held for resale by the customer and has not been used for any purpose other than retention, demonstration, or display, while being held for sale in the regular course of business; or (3) has been consumed by a customer who reported the tax due directly to respondent on its sales and use tax returns or paid the tax due to respondent pursuant to an assessment or an audit. (Cal. Code Regs., tit. 18, § 1668(e).)

It is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)1.)

If respondent is not satisfied with the amount of tax reported by the taxpayer, or in the case of a failure to file a return, respondent may determine the amount required to be paid on the basis of any information which is in its possession or may come into its possession. (R&TC, §§ 6481, 6511.) In the case of an appeal, respondent has a minimal, initial burden of showing that its determination was reasonable and rational. (*Appeal of Talavera*, 2020-OTA-022P.) Once respondent has met its initial burden, the burden of proof shifts to the taxpayer to establish that a result differing from respondent's determination is warranted. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

In this appeal, appellant claimed deductions for nontaxable sales for resale that totaled \$121,276 for the audit period. Appellant provided no sales invoices or resale certificates to support the claimed amounts. Although appellant did not provide any evidence, respondent accepted 50 percent of the claimed amounts as valid nontaxable sales for resale. Given the absence of resale certificates or sales invoices, respondent's disallowance of 50 percent of the claimed deductions was reasonable. Therefore, appellant has the burden to establish that an adjustment is warranted for additional claimed nontaxable sales for resale.

Appellant asserts that he has provided "all the seller's permits and name and address of business [sic] that were purchasing product [sic] for the purpose of reselling." The documents described are not in the record with the Office of Tax Appeals (OTA).¹⁴ However, the record indicates that that appellant provided three boxes of records to respondent in September 2020.

¹⁴ In a letter to appellant dated May 26, 2022, OTA requested that appellant provide any documentation that appellant wanted OTA to consider as part of this appeal. Appellant did not respond.

According to respondent, appellant stated during the appeals conference on October 6, 2020, that he had provided three boxes of documents to respondent on September 3, 2020. Appellant did not explain how the documents in the boxes would support any adjustment. Shortly after appellant made that statement at the conference, his telephone communication abruptly dropped off. The conference holder was uncertain whether appellant intended to end his participation in the conference or whether there was an equipment malfunction.

In response to appellant's assertion, respondent replied during the appeals conference that it had conducted a cursory review of the documents in the boxes and noted that appellant had not included a list of the documents or any explanation of what appellant intended the documents to show.

As noted previously, it is the retailer's responsibility to maintain complete and accurate records to support reported amounts and to make them available for examination. (R&TC, §§ 7053, 7054; Cal. Code Regs., tit. 18, § 1698(b)1). Moreover, a retailer bears the burden of establishing its entitlement to any claimed deduction or exemption. (*Paine v. State Bd. of Equalization* (1982) 137 Cal.App.3d 438, 443, *Owens-Brockway Glass Container, Inc.*, 2019-OTA-158P.) It is not sufficient for a retailer to provide voluminous, disorganized documents and expect respondent to compile the evidence that might support a deduction claimed on appellant's sales and use tax returns. (*Appeal of Amaya*, 2021-OTA-328P.)

Here, appellant claimed deductions totaling \$121,276 for nontaxable sales for resale, and respondent disallowed only \$60,639 of that amount. Thus, respondent has already allowed claimed deductions of \$60,639 as valid nontaxable sales for resale. Therefore, in order to support an adjustment in this case, appellant would need to document that its nontaxable sales for resale totaled more than \$60,639. Appellant has failed to do so.

Appellant has not shown that any adjustment is warranted to the disallowed claimed nontaxable sales for resale.

HOLDING

Appellant has not shown that adjustment is warranted to the audited amount of disallowed claimed nontaxable sales for resale.

DISPOSITION

Respondent’s decision to deny the petition for redetermination and to increase the tax, negligence penalty, and failure-to-file penalty to \$209,334.00, \$14,883.98, and \$6,049.41, respectively, is sustained.

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Josh Aldrich
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Josh Aldrich
Administrative Law Judge

DocuSigned by:
Suzanne B. Brown
47F45ABE68E34D0...
Suzanne B. Brown
Administrative Law Judge

Date Issued: 6/20/2023